STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALAN N. TAYLOR,

Defendant-Appellant,

and

MACKINAC CENTER FOR PUBLIC POLICY,

Amicus Curiae.

UNPUBLISHED
May 22, 2012

No. 295275
Kent Circuit Court
LC No. 08-011574-AR

Before: WILDER, P.J., and HOEKSTRA and BORRELLO, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his convictions of depositing or permitting the placing of fill material in a wetland, MCL 324.30304(a), and constructing, operating, or maintaining any use or development in a wetland, MCL 324.30304(c), both of which are violations of the Wetlands Protection Part (WPP) of the Natural Resources and Environmental Protection Act (NREPA). Defendant was convicted following a district court jury trial, and was sentenced to pay $8,500 in fines and costs. Defendant's convictions were affirmed by the circuit court. Defendant's delayed application for leave to appeal to this Court was denied for lack of merit in the grounds presented. *People v Taylor*, unpublished order of the Court of Appeals, entered April 21, 2010 (Docket No. 295275). In lieu of granting leave to appeal, our Supreme Court remanded the case to this Court for consideration as on leave granted. *People v Taylor*, 488 Mich 910; 789 NW2d 476 (2010). For the reasons set forth in this opinion, we affirm.

Defendant first argues that the trial court erroneously admitted into evidence an aerial photograph, the National Wetlands Inventory (NWI),[1] and the daily report of an engineering

[1] Defendant also argues that he should have been able to challenge the accuracy of the NWI, which was admitted into evidence. However, it appears that defendant is mistaken about what

technician. "The decision whether to admit evidence is within the trial court's discretion, which will be reversed only where there is an abuse of discretion." *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). However, decisions regarding the admissibility of evidence frequently involve preliminary questions of law, such as whether a rule of evidence precludes admission of the evidence, which are reviewed de novo. *Id.*

Defendant conceded the admissibility of the aerial photograph and the NWI. Accordingly, his waiver extinguished any error. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). While defendant argues that it would have been futile to object to the admissibility of the aerial photograph and the NWI because, based on other rulings, he knew that the trial court would overrule any objections, it is axiomatic that in order to preserve an issue for appeal, a party must object below. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). Defendant's argument is meritless.

Regarding the daily report, defendant argues that it was inadmissible because it contains multiple levels of hearsay. "[H]earsay within hearsay . . . may not be admitted unless both statements satisfy an exception to the hearsay rule." *People v Hawkins*, 114 Mich App 714, 719; 319 NW2d 644 (1982); MRE 805. MRE 801(c) defines hearsay as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Here, the statement in the daily report that one of defendant's employees had found old records indicating that the area was an old swamp that had been back-filled was not admitted to prove the truth of the matter asserted, i.e., that the area was actually an old swamp which had been back filled. There was a plethora of evidence on this point introduced through witness testimony and the parties' exhibits. Rather, the daily report was admitted to show that the employee was on notice of at least a question as to whether the area was an old swamp (i.e., wetland) to refute defendant's assertion that he was unaware of any issues surrounding the construction of the employee parking lot on a wetland area. Because the report did not contain multiple levels of hearsay, the trial court properly exercised its discretion in admitting it under MRE 803(6).

Defendant also argues that Rule 281.921(1)(b), adopted by the Michigan Department of Environmental Quality (MDEQ), is an invalid product of an unconstitutional delegation of legislative authority and that it defines "contiguous" incompatibly with the WPP/NREPA. On appeal to the circuit court, defendant stated:

> ***One of the other arguments we're not making***—you know, we'll leave it for another day, but colors everything here. A key issue in this case is the question of contiguity.

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actually occurred at trial. A careful review of the record reveals that the document that defendant sought to challenge at trial was the wetlands inventory for Kent County, which was not admitted into evidence. Defendant has abandoned this issue by failing to properly address the merits of his assertion of error, as his entire argument revolves around the wrong document. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004) ("An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue.").

* * *

> It's not enough that there be a wetland. It's got to be contiguous to another body of water. Well, the statute doesn't define contiguous. It uses the word, but it doesn't define it.
>
> It's kind of interesting because it does define 17 terms. But it doesn't bother to define this particular term. The Department of Environmental Quality came up with a definition which, then, it isn't even satisfied with, because it then has to issue a guidance document to explain some of it.
>
> But my point is this: ***And again, we're not making the argument, but I'm trying to clear the decks here, of what's not being made . . .***
>
> ***But we didn't make that argument. We noted in the footnote, but we didn't make it, so I'm not going to drop it on anybody right now, except to point out that it's there and it's not being made.*** (Emphasis added).

Based on our review of the record, defendant expressly abandoned these arguments on appeal to the circuit court. Accordingly, his waiver extinguished any error. *Carter*, 462 Mich at 214-216.

Defendant also argues that R 281.921(1)(b)(*iii*) creates an unconstitutional presumption. Specifically, defendant argues that the presumption of contiguity is irrebuttable in this case because the procedure for requesting the MDEQ to determine whether there is a surface or groundwater connection that meets the definition of contiguous is limited to "a person who owns or leases a parcel of property or his or her agent[,]" R 281.924(5), and that the petition procedure was not available to him as an individual. We review de novo questions of law. *People v Dupree*, 284 Mich App 89, 97; 771 NW2d 470 (2009). Defendant is correct that conclusive presumptions conflict with the overriding presumption of innocence and that they invade the fact-finding function of the jury. *Sandstrom v Montana*, 442 US 510, 521-524; 99 S Ct 2450; 61 L Ed 2d 39 (1979). Defendant acknowledges that he "could have petitioned the MDEQ on HEI's behalf," but argues that "such action would have been for its benefit, not his and had to be at its direction." However, defendant's reasoning strains the concept of agency. "Agent" is defined as "[o]ne who is authorized to act for or in place of another; a representative[.]" Black's Law Dictionary (9th ed). Defendant could have petitioned the MDEQ for a determination under R 281.921(1)(b)(*iii*) as the agent of his corporation, and he would have been acting "in place of" it. As stated by the circuit court, R 281.921(1)(b)(*iii*) "did not create an unconstitutional presumption simply because [defendant] forfeited the mechanism for establishing an exception to that definition." We concur with the reasoning of the circuit court and accordingly find that, as applied in this case, R 281.921(1)(b)(*iii*) does not create an unconstitutional presumption.

Defendant also argues that the prosecution failed to prove contiguity under the customary definition of the word. However, "[p]ursuant to MCL 8.3a, undefined statutory terms are to be given their plain and ordinary meaning, *unless* the undefined word or phrase is a term of art." *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007) (emphasis added). Courts only "consult a lay dictionary when defining common words or phrases that lack a unique legal

meaning." *Id*. at 151-152. Defendant's argument that the prosecutor was required to prove contiguity under the customary definition of the word is meritless where that term has been defined by Rule 281.921(1)(b).

Defendant argues that the trial court's jury instruction concerning contiguity was erroneous. "Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Defendant's argument that it was necessary for the trial court to instruct the jury that defendant's land had to be "in actual contact with" or "touching" the stream is meritless where the instruction properly tracked "contiguous" as defined, and given a unique legal meaning, in R 281.921. Defendant's additional argument that the trial court's instruction did not include the word "direct" is simply incorrect, and his argument that the trial court's instruction was inconsistent with the word "direct" is also incorrect. The trial court properly instructed the jury by giving the term "direct connection" its plain and ordinary meaning. A careful review of the jury instruction reveals that the trial court did, in fact, state that a "direct connection" was required to satisfy the definition of "contiguous." Moreover, the fact that the trial court essentially disregarded the MDEQ's related guidance document is irrelevant. An administrative agency interpretation cannot overcome the plain and ordinary meaning of a word, *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 323-324; 645 NW2d 34 (2002); therefore, the trial court's instruction based on the plain and ordinary meaning of "direct" was proper.

Defendant also argues that even if the instruction was correct, it was error requiring reversal "to give instructions upon a theory for the prosecution which is unsupported by the evidence." *People v Parks*, 57 Mich App 738, 745; 226 NW2d 710 (1975). Specifically, defendant argues that an MDEQ employee testified only that some surface water from the wetland "probably" found its way to Rogers Drain. However, a careful review of the record reveals that defendant presents the evidence out of context. The witness testified that a surface water connection existed and that, but for the pipe and defendant's construction of the parking lot, the surface water would have gone into the drain. This was also confirmed by two of defendant's witnesses. Accordingly, defendant's argument that the trial court's instruction was unsupported by the evidence is meritless.

Defendant also argues that even if correct, none of the trial court's interpretations of the WPP/NREPA and R 281.921(1)(b) can be applied here because only civil liability can be imposed based on a first-time interpretation of a statute or an administrative rule. However, *People v Doyle*, 451 Mich 93, 101, 113; 545 NW2d 627 (1996), provides that where an unambiguous statute is interpreted by the court for the first time, there is no unforeseeable change in the law precluding retroactive application. As set out above, the trial court's interpretation and application of the statutes and administrative rule did not change the law, but merely gave effect to the plain language of the statutes and rule. That is, "the law was as [the trial court] interpreted it to be, because of the nature of the unambiguous . . . language." *Id*. at 104. Because the trial court's decisions were not "'unexpected' and 'indefensible' in light of the law existing at the time of the conduct[,]" retroactive application was appropriate and defendant's argument is meritless. *Id*.

Defendant also argues that violations of MCL 324.30304 require proof of *mens rea* and are not strict liability offenses. Defendant argues that it did not waive this issue, but rather argues that any objection would have been futile given defendant's claim that the trial court was predisposed not to rule on constitutional questions. Defendant relies on our Supreme Court's recent decision in *People v Kowalski*, 489 Mich 488; 503 NW2d 200 (2011) to argue that intent is always an element of a criminal offense. We find *Kowalski* controlling in this case, but not for the reasons cited by defendant.

Despite defendant's claim that the trial court was essentially predisposed to not making any determinations as to whether the instant offense was one of strict liability or general intent, the record reveals the contrary. When going over the proposed jury instructions in this case there was a lengthy colloquy between defense counsel and the trial court. Toward the end of that colloquy the following discussion occurred:

> *Court:* . . . I don't know what the mens rea requirement is for this. Does he have to know it's a violation?
>
> *Defense Counsel:* This is (indiscernible) aiding and abetting statute I think you do.
>
> *Court*: Will I think---isn't this strict liability? I mean, just if you---
>
> *Defense Counsel:* Under to [sic] wetlands act is strict liability, yes.

In *Kowalski*, 489 Mich at 503, our Supreme Court held that when defense counsel stated he had "no objection" to the trial court's proposed jury instructions:

> . . . because defense counsel here explicitly and repeatedly approved the instruction, defendant has waived the error. This Court has defined "waiver" as "the intentional relinquishment or abandonment of a known right." "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute a waiver. *Kowalski*, 489 Mich at 503. (Internal footnotes omitted).

Contrary to the facts in *Kowalski* where defendant argued that trial counsel's statement "I have no objections," as opposed to explicitly approving the instructions,[2] constituted a forfeiture of the issue rather than a waiver of the issue, in this case when trial counsel responded that "under t[he] wetlands act it's strict liability," he waived any argument that these were anything other than strict liability offenses. Our Supreme Court has consistently held that: "A party may not harbor error at trial and then use that error as an appellate parachute." *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010); *Carter*, 462 Mich at 214; *Kowalski*, 489 Mich at 505. Additionally,

[2] Our Supreme Court labeled this distinction as "unavailing." *Kowalski*, 489 Mich at 505.

as noted in *Kowalksi*, 489 Mich at 505, "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." We therefore find that defendant has waived this issue and any error has been extinguished.

Defendant also argues that the trial court erred in determining that the exemption set out in MCL 324.30305(4)(a) was inapplicable in this case. Statutory interpretation is a question of law that is reviewed de novo. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997). MCL 324.30305(4)(a) provides that a wetland that is incidentally created as a result of excavation for mineral or sand mining is not subject to regulation under the WPP/NREPA. MCL 324.63101(g) provides that "mineral" "does not include clay, gravel, marl, peat, inland sand or sand mined for commercial or industrial purposes . . . ."[3] Defendant is correct that the definitional section of part 631 of the NREPA, concerning reclamation of mining lands, specifies that the definitions are "[a]s used in this part[.]" MCL 324.63101. However, "[s]tatutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole." *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). "The object of the in pari materia rule is to give effect to the legislative purpose as found in harmonious statutes[,]" *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998), and this Court has described the NREPA as "a comprehensive statutory scheme containing numerous parts, all intended to protect the environment and natural resources of this state." *People v Schumacher*, 276 Mich App 165, 171; 740 NW2d 534 (2007). Moreover, "[i]f statutes lend themselves to a construction that avoids conflict, then that construction should control." *Webb*, 458 Mich at 274.

Moreover, even within the WPP/NREPA, the Legislature distinguishes topsoil from minerals. For example, MCL 324.30304(b) requires a permit to "[d]redge, remove, or permit the removal of ***soil or minerals*** from a wetland" (emphasis added). And MCL 324.30316(4) provides that a person who violates the WPP may be ordered to restore the affected wetland, including "the removal of fill material deposited in the wetland or the replacement or ***soil, sand, or minerals***" (emphasis added). The word "or" generally refers to a choice or alternative between two or more things. *People v Neal*, 266 Mich App 654, 656; 702 NW2d 696 (2005). The Legislature's use of the disjunctive term "or" in reference to soil or minerals in the WPP/NREPA reveals that it contemplated soil and minerals as distinct substances, and that it did not intend topsoil to be subsumed in the term mineral for purposes of MCL 324.30305(4)(a). Because topsoil does not fall within the definition of mineral, the wetland was not incidentally created as a result of excavation for mineral or sand mining. Accordingly, the trial court

[3] Additionally, an attorney general opinion states that "[c]lay, gravel, marl, peat and sand have been excluded from the definition of mineral under section 63101(a) of Part 631 of the NREPA dealing with the reclamation of mining lands[,]" and that "[t]opsoil is certainly more akin to these excluded items than it is to an inorganic substance." OAG, 1997, No 6937, p 22 (April 7, 1997). While attorney general opinions are not binding on this Court, *People v Pitts*, 222 Mich App 260, 269 n 4; 564 NW2d 93 (1997), they can be persuasive authority. *Attorney General v PowerPick Player's Club of Mich, LLC*, 287 Mich App 13, 34; 783 NW2d 515 (2010).

correctly concluded that the exemption set out in MCL 324.30305(4)(a) was inapplicable in this case.

Lastly, defendant argues that he was entitled to a dismissal because the prosecution's proofs confirmed an affirmative defense where MDEQ soil borings indicated that there could be fill material on the subject land, thus confirming the defense that topsoil had been excavated. While "[a] trial court may direct a verdict if an affirmative defense is established by proofs presented by the prosecution," *People v McNeal*, 152 Mich App 404, 416; 393 NW2d 907 (1986), as noted above, the affirmative defense set out in MCL 324.30305(4)(a) was not applicable in this case because topsoil was excavated, as opposed to minerals.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Stephen L. Borrello